(2)

No. 90-352

In The

Supreme Court of the United States

October Term, 1990

SHARON NAVRATIL, individually and Guardian ad litem for SERENA NAVRATIL, a Minor,

Petitioners,

v.

CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTERINSURANCE BUREAU, a reciprocal insurance exchange,

Respondent.

OPPOSITION TO WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

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QUESTION PRESENTED FOR REVIEW

Implicit in petitioner's formulation of the question presented for review is an unwarranted assumption that the present case is "identical" to two other cases accepted for review by the California Supreme Court. The present case is not, however, identical to those cases. The relevant differences, discussed below, demonstrate that the California Supreme Court did not deny petitioner's Due Process or Equal Protection rights by declining to grant discretionary review.

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JURISDICTION

Petitioner claims that the jurisdiction of the Court is "invoked" pursuant to Title 28 U.S.C. §1247(3). There is, however, no §1247 within Title 28. Perhaps petitioner meant to "invoke" the Court's jurisdiction pursuant to Title 28 U.S.C. §1257(a). As the Court knows, review of a writ of certiorari, including a writ of certiorari authorized by §1257(a), is purely discretionary. Title 28 U.S.C. Supreme Court Rules, Rule 10.

The present case does not warrant the Court's discretionary review. The issue presented in this case involves the interpretation of a California statute prohibiting insurance companies from covering losses "caused by the wilful act of the insured." California Insurance Code §533. Neither the statute nor the application of the statute to this case are matters of national or federal Constitutional significance.

STATEMENT OF THE CASE

In August of 1986, Julius Barthel was found guilty of two felony counts of child molestation following a plea of nolo contendre. The victim of the crime, petitioner SERENA NAVRATIL, a minor, brought suit against Mr. Barthel for damages. Respondent CALIFORNIA STATE AUTOMOBILE ASSOCIATION (hereinafter referred to as CSAA), Mr. Barthel's insurer, sought a declaratory judicial determination that child molestation is not within the scope of coverage of Mr. Barthel's homeowner's insurance policy.

On September 1, 1988 the trial court granted CSAA's summary judgment motion. The court concluded that the evidence before it, including a deposition of Mr. Barthel, demonstrated that Mr. Barthel's conduct was wilful, and that, pursuant to California Insurance Code §533, his wilful acts are not covered by his homeowner's insurance policy (J.A. 2-3).

On appeal, the California Court of Appeals affirmed the trial court's ruling (J.A. 5). In June of 1990, the California Supreme Court denied Ms. Navratil's petition for review (J.A. 17).

Two cases involving Penal Code §288(a) violations are currently pending before the California Supreme Court. *State Farm Fire and Casualty Company v. Robin R.*, 216 Cal.App.3d 132, 264 Cal.Rptr. 326 (1989), *review granted February 15, 1990* (No. S013639); *J.C. Penney Casualty Insurance Company v. M.K.*, 209 Cal.App.3d 1208, 257 Cal.Rptr. 801 (1989), *review granted July 26, 1990* (No. S010524). While petitioner contends that these cases are identical to the present case, they are in fact distinguishable. The differences between these cases and this case are discussed below.

SUMMARY OF ARGUMENT

Petitioner contends that the California Supreme Court violated her Fourteenth Amendment Due Process and Equal Protection rights by declining to grant her petition for review. Petitioner contends that the California Supreme Court's failure to grant review deprives her of the opportunity to benefit from the ultimate resolution of

the two cases currently pending before the California Supreme Court. This contention is predicated on the erroneous assumption that the three cases are in fact identical.

The three cases are similar but not identical. Crucial differences exist between these cases. In *State Farm v. Robin R., supra,* the court held that a California Penal Code §288(a) violation requires, as a matter of law, a presumption of an intent to harm the victim. In *J.C. Penney, supra,* the court held that a §288(a) violation does not permit even an inference of an intent to do harm. In the present case, the court held that a §288(a) violation permits an inference of an intent to harm the victim. These make it unlikely that petitioner will benefit from the final disposition of the other two cases before the California Supreme Court.

Even if it were possible for petitioner to benefit from the final dispositions of *State Farm v. Robin R.* and *J.C. Penney,* no cases support her contention that, in the absence of invidious discrimination, the Due Process and Equal Protection Clauses govern the California Supreme Court's discretionary review.

ARGUMENT

I. SINCE THE ISSUE IN THIS CASE IS NOT OF NATIONAL OR CONSTITUTIONAL SIGNIFICANCE, THE UNITED STATES SUPREME COURT NEED NOT INVOKE ITS DISCRETIONARY JURISDICTION.

Title 28 U.S.C. Supreme Court Rules, Rule 10 articulates jurisdictional considerations governing review on a

writ of certiorari. While these considerations are not exhaustive, nor necessarily controlling, they do provide insights as to what matters the Court will consider. Since this case was not heard in the United States Court of Appeals, and does not involve a federal question, subsections (1)(a) and (1)(b) are inapplicable.

Subsection (1)(c) is, however, pertinent. Subsection (1)(c) states that the Court will likely hear a case "when a state court or a United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with the applicable decisions of this Court."

The present case does not involve an important federal question, nor does the state court's disposition of the cases conflict with decisions of this Court. Rather, this case involves the application of a California statute. Petitioner's claim that the state court's application of this statute violates the Due Process and Equal Protection clauses is without merit.

A. Since this case is not identical to the two other cases currently pending before the California Supreme Court, it is unlikely that the California Supreme Court's rulings will affect petitioner.

Petitioner contends that this case is identical to *State Farm Fire and Casualty Company v. Robin R.*, 216 Cal.App.3d 132, 264 Cal.Rptr. 326 (1989), *review granted February 15, 1990* (No. S013639), and *J.C. Penney Casualty Insurance Company v. M.K.*, 209 Cal.App. 3d 1208, 257 Cal.Rptr. 801 (1989), *review granted July 26, 1990* (No.

S010524), two cases currently pending before the California Supreme Court. These case, however, are not identical, and it is unlikely that the rulings in these cases will affect petitioner in any way.

In the first case, *State Farm v. Robin R., supra,* the California Court of Appeals held that a California Penal Code §288(a) violation warrants an irrebuttable presumption of an intent to harm the victim. In the range of possible approaches to this issue *State Farm v. Robin R.* represents one end of the spectrum. At the other end of the spectrum is the second case, *J.C. Penney v. M.K., supra.* In *J.C. Penney,* the California Court of Appeals held that a California Penal Code §288(a) violation does not permit an inference or a presumption of an intent to harm the victim. Since the holdings in these cases conflict, the California Supreme Court properly granted review.

Relying on *Allstate Insurance Company v. Kim W.,* 160 Cal.App.3d 326, 206 Cal.Rptr. 609 (1984), the court of appeal in the present case held that a violation of California Penal Code §288(a) permits an inference of an intent to harm the victim. California Insurance Code §533 forbids insurance companies from covering losses "caused by the wilful act of the insured." The court also held that an intent to harm the victim constitutes a wilful act under California Insurance Code §533. *Id.* at 332.

While *Allstate v. Kim W.* permits an inference of an intent to harm the victim, the case suggests that the defendant may rebut this inference. This crucial difference distinguishes *Allstate v. Kim W.* and the present case from *State Farm v. Robin R.* and *J.C. Penney.*

It is also noteworthy that the California Supreme Court denied review in *Allstate v. Kim W.* The approach taken in *Allstate v. Kim W.*, and followed in the present case, represents a rational approach to this issue. While denial of a petition for review to the California Supreme Court does not suggest an affirmance of the lower court's decision, it is relevant to the California Supreme Court's view of the case. *DiGenova v. State Board of Education*, 57 Cal.2d 167, 178, 18 Cal.Rptr. 369, 367 P.2d 865 (1962). Consequently, the California Supreme Court's denial of petitioner's request for review suggests that the approach taken by the appellate court in this case does not require alteration.

B. Assuming, *arguendo*, that petitioner could benefit from the California Supreme Court's rulings, the Equal Protection and Due Process Clauses do not mandate review of this case by the California Supreme Court.

The cases petitioner cite do not support the argument that the Due Process and Equal Protection Clauses of the Fourteenth Amendment mandate that the California Supreme Court hear this case.

Petitioner cites *Lawson v. Kolender*, 658 F.2d 1362, 1364 (9th Cir. 1981), a federal case involving the constitutionality of a California statute, in support of the proposition that the California Supreme Court's appellate review is purely discretionary. The California Court of Appeals stated in *Gilbert v. Municipal Court of North Orange County Judicial District*, 73 Cal.App.3d 723, 140 Cal.Rptr. 897 (1984), that the California Supreme Court has discretionary jurisdiction over cases tried in a superior court. *Id.* at

729. In other words, it is well established that the California Supreme Court has discretionary jurisdiction over the present case.

Since it is undisputed that the California Supreme Court has discretion to accept, or reject, cases as it deems appropriate, it follows that the Due Process and Equal Protection Clauses merely require that the court not act in a discriminatory fashion. There is no evidence that the California Supreme Court acted in a discriminatory fashion in this case. Its decision to reject this case for review was purely a matter of discretion.

Notwithstanding this reality, petitioner implies that *Griffin v. Illinois*, 351 U.S. 12 (1955), requires that the California Supreme Court hear petitioner's case. *Griffin v. Illinois*, however, has nothing to do with the exercise of discretionary review of a state Supreme Court. The case involved two indigent defendants convicted of armed robbery who sought to appeal their conviction in the Illinois Supreme Court. Seeking to proceed *forma pauperis*, they were unable to pay for copies of the Transcript and Court Record. As a result, they were denied access to an appeal. The United States Supreme Court held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment require states to provide rich and poor equal access to the appellate process. *Id.* at 19. The present case has nothing to do with access to an appeal. The present case relates to the California Supreme Court's exercise of discretion, and this Court in *Griffin v. Illinois*, said nothing about discretionary jurisdiction.

Another case cited by petitioner does relate to the California Supreme Court's exercise of discretionary

review. This case, however, does not advance petitioner's position. In *James v. Reese*, 546 F.2d 325 (9th Cir. 1976), petitioner alleged, *inter alia*, that the California Supreme Court denied him Due Process by rejecting his petition for review. The Ninth Circuit summarily rejected this claim: "[T]he allegation that the petitioner, even in the absence of an allegation of invidious discrimination, has a Due Process right to be granted a hearing by the California Supreme Court is simply without merit." *Id.* at 328. Unable to establish that her case is identical to the two cases currently before the California Supreme Court, petitioner has not established that the California Supreme Court discriminated against her.

The California Constitution provides for discretionary appellate review by the Supreme Court. Absent evidence that the California Supreme Court exercises this power in a discriminatory fashion, the Due Process and Equal Protection Clauses should not govern the California Supreme Court's discretion. Since Petitioner has not presented this Court with any evidence demonstrating that the California Supreme Court acted with discrimination in declining to review this case, the California Supreme Court acted consistent with Constitutional guidelines, therefore, the petition should be denied.

CONCLUSION

The California Supreme Court's denial of review was within its discretion, and consistent with the Constitution. Accordingly, respondent respectfully request that the Court deny petitioner's writ of certiorari.

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APPENDIX

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

CALIFORNIA STATE AUTOMOBILE ASSOCIATION
INTER-INSURANCE BUREAU,
Plaintiff and Respondent,

VS.

JULIUS J. BARTHEL, et al.,
Defendants and Appellants.

Super. Ct. No. 54692
Napa County

I. Synopsis of Case

Appellant Sharon Navratil (Navratil), individually and as guardian ad litem of Serena Navratil, a minor (Serena), filed two personal injury actions against appellant Julius J. Barthel (Barthel) based on two alleged acts of child molestation committed by Barthel against Serena. Barthel previously had pled nolo contendere to criminal charges of two counts of violation of Penal Code section 288, subdivision (a), based upon the same acts alleged in the personal injury actions.

In response to the civil actions, Barthel made a claim for coverage, including a duty to defend, upon respondent California State Automobile Association, Inter-Insurance Bureau, a reciprocal insurance exchange (CSAA), under his homeowner's insurance policy issued

by CSAA, and specifically section II, Coverage E thereof, which provided: "If a claim is made or a suit is brought against any *insured* for damages because of *personal injury or property damage* caused by an *occurrence* to which this coverage applies, we will: [¶] 1. pay up to our limit of liability for the damages for which the *insured* is legally liable; and [¶] 2. provide a defense at our expense. . . ." The policy defined "occurrence" as "an accident, including exposure to conditions which results during the policy period in: [¶] a. *personal injury;* or [¶] b. *property damage.*"

CSAA denied coverage under the policy, relying on an exclusionary clause for personal injury or property damage, "the type of which is expected or intended by the *insured*. . . ." CSAA then filed the instant action against Barthel and Navratil, seeking a judicial declaration of noncoverage based upon the exclusionary clause as well as Insurance Code section 533 (insurer not liable for loss caused by insured's willful act).

CSAA subsequently moved for summary judgment. (Code Civ. Proc., § 437c.) The trial court granted summary judgment, declaring that the policy did not provide coverage for the acts or injuries alleged in the personal injury actions. In its statement of decision, the court rule that (1) as a matter of law the acts of child molestation by Barthel did not constitute accidental "occurrence[s]" within the scope of coverage under the policy, because intentional acts are not accidental; (2) the acts of child molestation for which Barthel was convicted under Penal Code section 288, subdivision (a), were excluded from coverage as a matter of law under *Allstate Ins. Co. v. Kim W.* (1984) 160 Cal.App.3d 326; and (3) the evidence before

the court, including Barthel's deposition testimony, established his acts were willful and not accidental.

Barthel and Navratil appeal. We affirm.

II.

Pertinent Case Law and Discussion

Allstate Ins. Co. v. Kim W., supra, 160 Cal.App.3d 326 is the leading appellate decision directly pertinent to the specific issues before us. In *Kim W.,* a minor filed a complaint through her guardian ad litem against Korte seeking damages for injuries resulting from several acts of sexual assult. Korte was insured under a homeowner's insurance policy which expressly excluded coverage for bodily injury or property damage "intentionally caused by an insured person." (*Id.,* at pp. 229-330.) The insurer brought an action for declaratory relief against both Korte and the minor, seeking a declaration that the policy provided no coverage to Korte for the acts alleged in the minor's complaint. (*Id.,* at p. 330.)

The insurer's complaint alleged that Korte had engaged in conduct constituting a violation of Penal Code section 288. The complaint referred to a criminal proceeding in which Korte had been charged with various sexual offenses against children. (*Allstate Ins. Co. v. Kim W., supra,* 160 Cal.App.3d at p. 333, fn. 3.) Korte answered admitting that he had engaged in conduct which constituted a violation of Penal Code section 288. The trial court thereafter granted the insurer's motion for judgment on the pleadings. (*Id.,* at p. 30.)

On appeal, the court affirmed. The court rejected the argument that the insurer was not exonerated from liability under the policy because, though the act may have been willful, the resulting injury was not intended or expected. The court stated: "[U]nder certain circumstances, the nature of the intentional act of the insured is such that an intent to cause at least some harm can be inferred as a matter of law, and that as long as some harm is intended, it is immaterial that harm of a different magnitude from that contemplated actually resulted. [Citations.] We conclude that an act which constitutes a violation of Penal Code section 288 is such an act." (*Allstate Ins. Co. v. Kim W., supra,* 160 Cal.App.3d at p. 332.) The court accordingly found the injuries alleged in the minor's complaint fell with the scope of the exclusionary clause of the policy.

Kim W. has been followed and affirmed in recent appellate decisions. (See. e.g., *Fire Insurance Exchange v. Abbott* (1988) 204 Cal.App.3d 1012, 1023-1024 [violation of Penal Code section 288 creates an inference of an intent to injure which may not be overcome by evidence of a subjective lack of intent to harm so as to avoid coverage exclusion].)

J. C. Penney Casualty Ins. Co. v. M. K. (1989) 209 Cal.App.3d 1208, cited by appellants, constitutes the sole California authority for their position that the insurance exclusion for intentional acts requires proof of a preconceived subjective intent to inflict harm, and that a violation of Penal Code section 288 does not necessarily give rise to an inference of such intent. Significantly, however,

the California Supreme Court granted review of that decision (review granted July 26, 1989). That decision accordingly may no longer be relied upon as authority.

Kim W. and its progeny support the trial court's determination that the alleged injuries resulting from acts for which Barthel was convicted of violations of Penal Code section 288, subdivision (a), fell within the scope of the policy's exclusionary clause, as well as Insurance Code section 533, as a matter of law. The granting of summary judgment therefore did not constitute error.

III.

Disposition

The judgment is affirmed.

Strankman, J.

We concur:

White, P.J.

Barry-Deal, J.

SUPREME COURT FILED
JUNE 21 1990
Robert Wandruff Clerk

DEPUTY

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

First Appellate District, Division Three, No. A043989
SO15437

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

CALIFORNIA STATE AUTOMOBILE ASSOCIATION INTER-INSURANCE,
Respondent,

vs.

JULIUS J. BARTHEL ET AL.,
Appellants.

Appellant's petition for review DENIED.

PANELLI
Acting Chief Justice
